

APPEAL NO. 040347
FILED APRIL 1, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 21, 2004. The hearing officer determined that: (1) respondent/cross-appellant (claimant) sustained an injury in the course and scope of his employment on _____; (2) appellant/cross-respondent (carrier) waived the right to contest the compensability of the claimed injury; (3) claimant is barred from pursuing workers' compensation income benefits "because of an election of benefits under his contract and collective bargaining agreement [CBA]"; (4) "[c]laimant is not barred from pursuing Texas [w]orkers' [c]ompensation medical care or benefits because of election of benefits under the [1989] Act"; (5) claimant reached maximum medical improvement (MMI) on November 14, 2003; (6) claimant's impairment rating (IR) is 4%; and (7) claimant had disability from March 1, 2001, through the date of the hearing. Carrier appealed, contending that: (1) claimant did not have disability because he was able to play his sport for his team after his injury; (2) carrier did not waive the right to contest the compensability of the injury; (3) claimant is barred from pursuing workers' compensation medical benefits due to his election under the 1989 Act; and (4) the hearing officer erred in construing Section 406.095 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 112.401 and 112.402 (Rules 112.401 and 112.402). Claimant responded that: (1) there was carrier waiver in this case; (2) the hearing officer did not err in determining that claimant had disability; and (3) the hearing officer did not err in determining that claimant is not barred from pursuing workers' compensation medical benefits. Claimant cross-appealed, contending that: (1) carrier waived the right to contest the compensability of the claim, so it cannot assert an election defense and is liable for income benefits; (2) the hearing officer erred in determining that carrier is not liable for income benefits; (3) the hearing officer erred in determining that claimant made an election of benefits; (4) the benefits under claimant's employment contract were not equal to or greater than the workers' compensation benefits, so there was no election; (5) the hearing officer erred in determining that claimant is barred from pursuing workers' compensation income benefits; and (6) the hearing officer erred in construing Section 406.095 and Rules 112.401 and 112.402. The file does not contain a response from carrier. The parties stipulated that claimant's IR is 4%. The hearing officer's determinations regarding MMI and IR have not been appealed and have become final.

DECISION

We affirm in part and reverse and render in part.

Claimant testified that he was a professional athlete who sustained a work-related knee injury on _____. Carrier contends the hearing officer erred in determining that it waived the right to contest the compensability of the injury in this case. The hearing officer determined that on September 6, 2000, carrier received first

written notice that claimant was claiming a work-related injury, and that carrier did not take any action within seven days. Carrier contends that “technically” it knew of the injury on September 6, 2000, but that it was not required to take action within the seven-day period because it was not given notice that claimant had elected to claim workers’ compensation benefits. Carrier asserts that it is too burdensome for it to “make a decision every time it receives notice of the daily injuries received by professional athletes” Carrier asserts that its duty to take action is put in motion, not by written notice of injury, but by the player’s election to seek workers’ compensation benefits. We disagree. Carrier was required to comply with the seven-day “pay or dispute” provisions in effect regarding this injury and the hearing officer did not err in determining that carrier waived the right to contest the compensability of the claim.

Both parties appeal the hearing officer’s determinations regarding carrier waiver and election of remedies. Carrier contends that the hearing officer erred in determining that, “[c]laimant is not barred from pursuing Texas [w]orkers’ [c]ompensation medical care or benefits because of election of benefits under the 1989 Act.” Carrier asserts that claimant is completely barred from pursuing workers’ compensation benefits pursuant to a deemed election under Section 406.095. Claimant also appealed in this regard and contends that carrier waived the right to contest the compensability of the claim, so carrier lost its right to assert an affirmative defense regarding any election. Claimant asserts that the hearing officer erred in determining that carrier is not liable for income benefits. Claimant contends the hearing officer erred in determining that there was an election pursuant to Section 406.095. Both parties complain regarding the way the hearing officer construed that section and Rules 112.401 and 112.402.

We conclude that by waiving its right to contest compensability of the injury, carrier lost its right to assert the affirmative defense of election pursuant to Section 406.095. See Texas Workers’ Compensation Commission Appeal No. 030793-s, decided May 16, 2003. To preserve its right to investigate and assert any defenses, including defenses that could not be asserted within the seven days because they are not yet applicable, carrier was required to take action within the seven-day period. Texas Workers’ Compensation Commission Appeal No. 022091-s, decided October 7, 2002. The hearing officer erred in determining that “[c]laimant is barred from pursuing Texas [w]orkers’ [c]ompensation weekly or income benefits because of election of benefits under his contract and [CBA].” The hearing officer did not err in determining that “[c]laimant is not barred from pursuing Texas [w]orkers’ [c]ompensation medical care or benefits because of election of benefits under the [1989] Act.”

The hearing officer stated that in asserting that there was an election under Section 406.095, carrier was not contesting compensability. However, we hold that this was a contest regarding carrier’s liability, which carrier lost the right to assert due to its waiver. Because of our holding regarding carrier waiver, we need not address the merits of whether claimant made an election or the application of Section 406.085 and Rules 112.401 and 112.402.

Carrier contends that the hearing officer erred in determining that claimant had disability. Carrier asserts that claimant was able to play professionally after his compensable injury and the only reason he was not able to obtain or retain his preinjury wage was because his contract ended by its own terms on February 28, 2001. The hearing officer heard evidence from claimant and his sports agent regarding claimant's knee injury and resulting staph infection, the effects of the injury on claimant's speed, the inability of claimant to renegotiate his contract or even obtain an invitation from other teams to take a physical or try out for the other teams, and the reasons why claimant was not invited to try out for other teams. No one specifically testified that they would not hire claimant because he had sustained a workers' compensation injury. The hearing officer heard the evidence and decided what facts were established. Claimant need only prove that the injury is a cause of the inability to earn the preinjury wage, not the cause. Texas Workers' Compensation Commission Appeal No. 992251, decided November 24, 1999. We conclude that the hearing officer's disability determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm that part of the hearing officer's decision and order that determined that: (1) carrier waived the right to contest the compensability of the injury; (2) claimant sustained a compensable injury; (3) "[c]laimant is not barred from pursuing Texas [w]orkers' [c]ompensation medical care or benefits because of [an] election of benefits"; and (4) claimant had disability from March 1, 2001, through the date of the hearing. We reverse that part of the hearing officer's decision and order that determined that claimant is "barred from pursuing Texas [w]orkers' [c]ompensation weekly or income benefits because of an election of benefits under his contract and [CBA]." We render a decision that: (1) carrier waived its right to contest the compensability of the injury, so carrier lost its right to assert the affirmative defense of election pursuant to Section 406.095; and (2) claimant is not barred from pursuing workers' compensation weekly or income benefits because of an election of benefits under his contract and CBA. Carrier is ordered to pay medical and income benefits in accordance with the 1989 Act and Commission rules.

According to information provided by carrier, the true corporate name of the insurance carrier is **GULF INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Margaret L. Turner
Appeals Judge